**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

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| COMMONWEALTH OF PENNSYLVANIA, Appellee | : | IN THE SUPERIOR COURT OF PENNSYLVANIA |
| v. | : | |
| TIMOTHY R. GEARHART, Appellant | : | No. 959 MDA 2012 |

Appeal from the PCRA Order entered November 3, 2011, in the Court of Common Pleas of Berks County, Criminal Division, at Nos. CP-06-CR-0005239-2007.

BEFORE: MUNDY, OTT, and STRASSBURGER*, JJ.

MEMORANDUM BY STRASSBURGER, J.: Filed: February 22, 2013

Timothy R. Gearhart (Appellant) appeals *pro se* from the order entered November 3, 2011, dismissing his petition filed pursuant to the Post Conviction Relief Act (PCRA).[1] We affirm.

The pertinent factual and procedural history of this action has been summarized by the PCRA court as follows

> On August 6, 2008, [Appellant] pleaded guilty to murder in the third degree, 18 Pa.C.S. § 2502(c), and conspiracy to commit aggravated assault, 18 Pa.C.S. § 903(a). [These convictions resulted from an incident in which Appellant struck the victim in the face with a table leg, resulting in his death, during an encounter between the victim, Appellant, and two of Appellant's friends.] On August 25, 2008, Appellant was sentenced to 20 to 40 years' imprisonment for the murder conviction, followed by 20 years of special probation for the conspiracy conviction. Following sentencing, on motion of the District Attorney, the remaining charges against Appellant, which included first-degree murder and aggravated assault, were

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[1] 42 Pa.C.S. §§ 9541-9546.

* Retired Senior Judge assigned to the Superior Court.

> dismissed. Appellant filed a timely appeal, which was denied by the Superior Court on October 9, 2009.
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> On August 9, 2010, Appellant filed a *pro se* petition pursuant to the [PCRA], and [the PCRA court] appointed counsel to represent Appellant in the matter. After reviewing the case, counsel filed a "'No-Merit' Letter" pursuant to ***Commonwealth v. Finley***, [550 A.2d 213 (Pa. Super. 1988) (*en banc*)] and ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988) on October 26, 2011. After conducting an independent review of the record, [the PCRA court] agreed with PCRA counsel that Appellant's petition failed to raise an issue of arguable merit. Accordingly, [the PCRA court] granted PCRA counsel's motion to withdraw and gave ... notice [pursuant to Pa.R.Crim.P. 907] that Appellant's petition would be dismissed on November 3, 2011. On December 5, 2011, [the PCRA court] dismissed appellant's PCRA petition[.]

PCRA Court Opinion, 8/3/2012, at 1. This appeal followed.[2] Both Appellant and the trial court have complied with the directives of Pa.R.A.P. 1925.[3]

On appeal, Appellant presents for our consideration the following issues:

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[2] Appellant filed a *pro se* notice of appeal on November 28, 2011. However, due to the notice presumably being premature, the Clerk of Court's Office failed to forward that notice to the Superior Court after the PCRA court dismissed Appellant's PCRA petition on December 5, 2011. Upon Appellant's inquiry to this Court regarding the status of his appeal, a *Per Curiam* Order was entered by this Court directing the trial court to forward the appeal. Thus, this appeal is now properly before us.

[3] The Commonwealth, in its brief, requests that we dismiss Appellant's appeal on the basis that Appellant failed to raise his issues in a concise manner in his Rule 1925(b) statement. Although Appellant's statement exceeds the parameters of Rule 1925(b), because we can discern the issues raised therein, we decline to find the issues waived on this basis. The Commonwealth further implies that Appellant's statement was filed untimely. A review of the certified record reveals Appellant's statement was in fact filed within the time required by the PCRA court's order directing for the filing of the statement.

[1.] Whether trial counsel Glenn Welsh was ineffective where he failed to investigate witnesses and evidence that could have proven his client's innocence?

[2.] Whether trial counsel Glenn Welsh was ineffective where he obtained the guilty plea by way of coercion, inducement and threat which was witnessed by a reliable third party?

[3.] Whether the trial court abused its discretion in failing to conduct an on-the-record Post-Conviction Relief Act Petition evidentiary hearing after Appellant presented to the court via Memorandum of Law in support of (PCRA), the fact that coercion and inducement of his guilty plea was [sic] witnessed by reliable third party[?]

[4.] Whether Appellant was denied Constitutional Rights as guaranteed by the Pennsylvania Constitutional Amendment 1, § 9, and the United States Constitutional Amendment 6, pertaining to effective assistance of counsel?

[5.] Whether the trial court abused its discretion by denying Appellant's Motion for Change of Counsel during a pre-trial hearing wherein Appellant was left with counsel that did not have his (Appellant's) best interest involved in strategies?

[6.] Whether the trial court committed error by pitting client against attorney at a Motion for Change of Counsel hearing dated 7/28/08, causing more conflict between attorney and client causing prejudice to this Appellant?

[7.] Whether Direct Appeal counsel Eric Gibson was ineffective where he failed to present for appellate review the errors by the trial court aforementioned, the abuse of discretion by the trial court aforementioned (see [4-6])[?]

[8.] Whether [PCRA] counsel Hoffert was ineffective in her refusal to present to the Court of Common Pleas of Berks County the issues/claims presented to her by Appellant via PCRA Petition and Memorandum in support of PCRA Petition. Where counsel Hoffert failed to request an evidentiary hearing in light of evidence presented to her would have proven during testimony at a hearing that the plea was induced and coerced?

> [9.] Whether PCRA counsel was ineffective for failing to discover and present trial counsel Welch's ineffective assistance, trial court errors and trial court abuses of discretion?
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> [10.] Whether PCRA counsel Hoffert was ineffective in failing to develop for PCRA review, direct appeal counsel Gibson's ineffectiveness in his lack of presentation of issues and claims of trial court error, trial court abuse of discretion and trial counsel Welsh's ineffectiveness?

Appellant's Brief at 4-6. Appellant's issues have been rearranged and renumbered for ease of discussion.

In reviewing the propriety of an order granting or denying PCRA relief, an appellate court is limited to ascertaining whether the record supports the determination of the PCRA court and whether the ruling is free of legal error. ***Commonwealth v. Johnson***, 966 A.2d 523, 532 (Pa. 2009). This Court grants great deference to the findings of the PCRA court if the record contains any support for those findings. ***Commonwealth v. Boyd***, 923 A.2d 513 (Pa. Super. 2007). If the record supports a post-conviction court's credibility determination, it is binding on the appellate court. ***Commonwealth v. Knighten***, 742 A.2d 679, 682 (Pa. Super. 1999). To be entitled to relief under the PCRA, the petitioner must plead and prove by a preponderance of the evidence that the conviction or sentence arose from one or more of the errors enumerated in section 9543(a)(2) of the PCRA. Such errors include the ineffectiveness of counsel and the unlawful

inducement of a guilty plea. ***See*** 42 Pa.C.S. § 9543(a)(2)(ii) and (a)(2)(iii), respectively.[4]

Additionally, in reviewing the PCRA court's denial of Appellant's claims of ineffective assistance of counsel, we bear in mind that counsel is presumed to be effective. ***Commonwealth v. Martin***, 5 A.3d 177, 183 (Pa. 2010). To overcome this presumption, Appellant bears the burden of proving the following: "(1) the underlying substantive claim has arguable merit; (2) counsel whose effectiveness is being challenged did not have a reasonable basis for his or her actions or failure to act; and (3) the petitioner suffered prejudice as a result of counsel's deficient performance." ***Id.*** Appellant's claim will be denied if he fails to meet any one of these three prongs. ***Id.***

> A chosen strategy will not be found to have been unreasonable unless it is proven that the path not chosen offered a potential for success substantially greater than the course actually pursued. Finally, to prove prejudice, a defendant must show

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[4] Section 9543(a)(2) requires, in relevant part, that the conviction or sentence resulted from one or more of the following:

* * *

> (ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
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> (iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent. ...

42 Pa.C.S. § 9543 (a)(2)(ii) and (iii).

> that but for counsel's error, there is a reasonable probability, i.e., a probability that undermines confidence in the result, that the outcome of the proceeding would have been different.

***Commonwealth v. Miller***, 987 A.2d 638, 648-49 (Pa. 2009).

Keeping the above standards in mind, we now address Appellant's claims on appeal. Appellant in his first issue contends that trial counsel, Attorney Glenn Walsh, was ineffective because he failed to investigate witnesses and evidence that could have proven Appellant's innocence.[5] Specifically, Appellant alleges, having been charged with, *inter alia*, murder (both first degree and third degree murder,) he requested Attorney Welsh to have the weapon used in the commission of the homicide tested for DNA evidence. Appellant asserts that had DNA testing been conducted it would have proven his innocence. Appellant also argues that Attorney Welsh failed to interview or depose Appellant's friends and codefendants that were with him the evening of the incident, i.e., Andrew Weber, Terry Kline, Kenneth Kline, and Derick Houser, who would corroborate that Terry Kline is the

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[5] Generally, where a petitioner has entered a guilty plea, the truth-determining process is not implicated and the claim is not cognizable under the PCRA. ***Commonwealth v. Moore***, 653 A.2d 24, 25 (Pa. Super. 1995). However, because Appellant intersperses these claims with his claim of unlawful inducement in connection with his plea of guilt, and he alleges that he is innocent, we find these claims cognizable. ***Commonwealth v. Laszczynski***, 715 A.2d 1185, 1187-88 (Pa. Super. 1998). Appellant inartfully argues that he was unlawfully induced to plead guilty by counsel and that in doing so counsel failed to consider or pursue any exculpatory evidence. Moreover, our Supreme Court has recently determined that "a concession of guilt does not foreclose prisoner access to the PCRA." ***Commonwealth v. Haun***, 32 A.3d 697, 705 (Pa. 2011).

person who struck the victim/decedent, killing him, not Appellant. Appellant further contends that counsel should have interviewed Tristen Robinson and Andrew Gullich, each whom could have testified to Terry's demeanor as being aggressive or hostile after leaving the bar, and prior to the incident. Appellant's Brief at 22. Lastly, Appellant asserts that he asked Attorney Welsh to interview employees of the restaurant/bar outside of which the incident occurred. He posits that "[i]f trial counsel would have interviewed these employees, it would have been discovered that the employees themselves placed the Table Leg in the location that it was found," supporting Appellant's theory that Terry Kline had struck the victim/decedent with his fist instead of Appellant with the table leg. ***Id.*** We find no merit to Appellant's claims.

It is well-settled that "the failure to call a witness is not *per se* ineffective assistance of counsel as such decision generally involves a matter of trial strategy." ***Commonwealth v. Lauro***, 819 A.2d 100, 105 (Pa. Super. 2003) (citation omitted). A claim that counsel was ineffective for failing to investigate potential witnesses or call them to testify at trial requires a petitioner to "establish that the witness existed and was available, that counsel was informed of the witness' existence, that the witness was ready and willing to testify and that the absence of the witness prejudiced the defendant to a point where the defendant was denied a fair trial."

***Commonwealth v. Moser***, 921 A.2d 526, 531 (Pa. Super. 2007) (citation omitted).

While Appellant has identified Andrew Weber, Terry Kline, Kenneth Kline, Derick Houser, Tristen Robinson and Andrew Gullich as witnesses possessing exculpatory evidence, Appellant neither showed counsel was informed of witnesses Robinson and Gullich's existence, nor that any of the above named witnesses were ready and willing to testify on his behalf. Thus, Appellant cannot establish that trial/plea counsel was ineffective for failing to call these individuals as defense witnesses. ***Commonwealth v. Brown***, 767 A.2d 576 (Pa. Super. 2001) (holding trial counsel's failure to locate or call named alibi witness at trial was not ineffective assistance of counsel, absent evidence that witness existed, that she was known or should have been known to trial counsel, and that she was willing and available to testify at trial on behalf of the defendant). To the extent that Appellant alleges that he was entitled to an evidentiary hearing to develop the testimony of the identified witnesses, we find Appellant's claim in this regard similarly without merit. Appellant was required to comply with the directives of 42 Pa.C.S. § 9545(d)(1). Section 9545(d)(1) provides:

> Where a petitioner requests an evidentiary hearing, the petition shall include a signed certification as to each intended witness stating the witness's name, address, date of birth and substance of testimony and shall include any documents material to that witness's testimony. Failure to substantially comply with the requirements of this paragraph shall render the proposed witness's testimony inadmissible.

42 Pa.C.S. § 9545(d)(1). Appellant provided no certification with respect to any of the potential witnesses. Appellant having failed to provide the requisite certifications, the trial court did not abuse its discretion by failing to conduct an evidentiary hearing. ***Brown***, 767 A.2d at 583.

In the second part of this claim, Appellant alleges that trial/plea counsel was ineffective for failing to request DNA testing on the table leg used to strike and kill the victim. He asserts that he did not strike the victim with the table leg; rather, Appellant maintains that Terry Kline struck the victim with his fist causing the victim to fall and sustain a fatal head injury on the steps of a store front. Thus, Appellant argues that DNA testing of the table leg would have exculpated him as the person who struck the victim. The PCRA court, in finding Appellant's claim did not entitle him to any relief, reasoned as follows:

> We find that counsel's decision not to pursue DNA testing had a clear reasonable basis.
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> In ***Commonwealth v. Williams***, 899 A.2d 1060 (Pa. 2006), the Pennsylvania Supreme Court held that an attorney's decision not to seek potentially exculpatory DNA testing did not necessarily meet the "reasonable basis" of ineffective assistance. The court reasoned:
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>> It is easy to say that failing to pursue exculpatory evidence is ineffectiveness, but this presumes the evidence will be exculpatory. If counsel were sure the accused's DNA would not be revealed in any relevant samples from the victim or scene, certainly testing would give exculpatory results and should be sought. However, the client's mere claim of innocence or alibi does not always settle the question; effectiveness of counsel is not dependent on accepting the candor of the

> client. Testing that shows the DNA matches suddenly makes a conviction –one that might have been avoided or less than certain – a sure thing.

899 A.2d at 1064. Accordingly, "[n]ot seeking testing that has the potential to convict a client may be a very reasonable strategy; ..." ***Id.*** In the instant case, counsel was aware of three particularly inculpating documents which were admitted into evidence at an omnibus pretrial hearing held on April 15, 2008. The first of these was a statement Appellant gave to police on September 7, 2007, the night of his arrest. (Omnibus Pretrial Hr'g Tr. 285-88 (April 15, 2008.) In his statement to police, Appellant gave the following account:

> Kyle came out of somewhere & saw Kenny urinating on the sidewalk. When he said something to Kenny he took his phone & threw it across the street. Kenny turned around & walked on the other side of the car not paying Kyle any mind. It looked to me like Kyle was going to hit Kenny. I hollered, "You," picked up a stick & hit him with it & he just dropped. I jumped in the car & the next thing I remember the cops were there. ...
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> Q: What did you do with the object you hit Kyle with?
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> A: I don't remember.
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> Q: What size was the object you used to hit Kyle with?
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> A: I just smacked him in his face. It was about this long (indicating with his hand a length of approx.. 18 inches).

(***Id.*** at 286-87.) A second piece of evidence was a statement given by Mr. Terry Kline, one of the other individuals present with Appellant the night of the event in question. (***Id.*** at 256-60.) In this statement, which Kline gave to police the day after the victim was slain, he alleged that Appellant "picked up an object and hit the gentleman with it and the gentleman fell to the sidewalk. After that we got in the vehicle to run." (***Id.*** at 257.) A third piece of evidence was a letter Appellant wrote to Ms. Desiree Harper, who had previously been his teacher at Pennsylvania School of Business. (***Id.*** at 265-69.) In this letter,

> Appellant gave Harper an account, which he described as a "play by play," of the night's events:
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>> We came out of the bar [and] a friend got into an argument with some random person in the parking lot, so we calmed him down [and] got into the car. While driving down Main Street in Kutztown, we realized that we should gone to the bathroom before we left. So we stop right on Main St. to get out to take a leak. This Kyle kid makes a comment to my friend about this, so he said "who you talking to," (the kid was on the phone)[.] Kyle said "not you" [and] my friend took his phone [and] threw it across the street. Kyle did not go after his phone he went after my friend. Upon seeing this [and] knowing when someone is about to attack I bent down [and] picked up a table leg or something [and] swung, thinking the kid would stumble holding his head never thinking he would die. Scared out of my mind when I saw him hit the ground I jumped in the car. My friend got in behind me [and] we went to leave [and] the cops showed up.
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> (***Id.*** at 266.) In light of this and other evidence introduced at the pretrial hearing, counsel had reason to believe that seeking DNA testing would strengthen, rather than weaken the Commonwealth's case against Appellant; and counsel declined to seek testing. We find that this approach by counsel was not without a reasonable basis; consequently, it does not demonstrate ineffective assistance of counsel.

PCRA Court Opinion, 8/3/2012, at 3-5. While we agree with PCRA court's rationale, we additionally find that Appellant's vague assertion that DNA testing of the table leg would lead to exculpatory evidence is, at best, speculative. This Court has previously stated "[i]n DNA as in other areas, an absence of evidence is not evidence of absence." ***Commonwealth v. Heilman***, 867 A.2d 542, 547 (Pa. Super. 2005). Even if the table leg exhibited no traces of Appellant's DNA, this absence of evidence does not

establish Appellant's innocence, as he asserts. Notwithstanding the absence of Appellant's DNA on the table leg, based upon the statements given to the police by Appellant and his codefendants, and Appellant's admission to Ms. Harper, sufficient evidence exists to uphold Appellant's convictions. Moreover, a murder suspect may be convicted on wholly circumstantial evidence. ***Id.*** Accordingly, Appellant's claim, of counsel's ineffectiveness for failing to pursue DNA testing, is devoid of merit.

Next Appellant contends that trial/plea counsel was ineffective where counsel obtained Appellant's guilty plea by way of coercion, inducement, and threat, all of which was witnessed by defense co-counsel, Mr. Timothy Biltcliff. Specifically, Appellant alleges that Attorney Welsh advised him that if he did not accept the plea agreement offered (third degree murder), based on the overwhelming evidence against him, he would be convicted of first-degree murder and sentenced to life imprisonment. Appellant states that had there been an evidentiary hearing, Attorney Biltcliff would have corroborated Appellant's description of Attorney Welsh's insistent and threatening conduct. Thus, Appellant asserts that Attorney Welsh's threats, coupled with counsel's intended trial strategy,[6] with which Appellant disagreed, left Appellant no alternative but to plead guilty. Accordingly,

[6] Appellant alleges that Attorney Welsh intended to proceed on the theory of diminished capacity, should the case be tried.

Appellant requests that we find counsel ineffective and that his plea was involuntarily rendered.

As Appellant made these claims following the imposition of sentence, he was required to make a showing of manifest injustice. ***Commonwealth v. Gunter***, 771 A.2d 767 (Pa. 2001). "The law does not require that [the defendant] be pleased with the outcome of his decision to enter a plea of guilty: All that is required is that [his] decision to plead guilty be knowingly, voluntarily and intelligently made." ***Commonwealth v. Yager***, 685 A.2d 1000, 1004 (Pa. Super. 1996) (*en banc*) (citation omitted, internal quotations omitted).

Further, when a defendant has entered a guilty plea, we presume that he was aware of what he was doing; it is his burden to prove that the plea was involuntary. Accordingly, where the record clearly shows the court conducted a guilty plea colloquy and that the defendant understood the nature of the charges against him, the plea is voluntary. ***Commonwealth v. McCauley***, 797 A.2d 920, 922 (Pa. Super. 2001). In examining whether an appellant understood the nature and consequences of his plea, we look to the totality of the circumstances. ***Id***. We have held that, at a minimum, the trial court must inquire into the following six areas:

> (1) Does the defendant understand the nature of the charges to which he is pleading guilty?
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> (2) Is there a factual basis for the plea?

> (3) Does the defendant understand that he has a right to trial by jury?
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> (4) Does the defendant understand that he is presumed innocent until he is found guilty?
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> (5) Is the defendant aware of the permissible ranges of sentences and/or fines for the offense charged?
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> (6) Is the defendant aware that the judge is not bound by the terms of any plea agreement tendered unless the judge accepts such agreement?

***Id***. ***See also*** Comment to Pa.R.Crim.P. 590. This examination may be conducted by defense counsel or the attorney for the Commonwealth, as permitted by the Court. Comment, Pa.R.Crim.P. 590. The examination may consist of both a written colloquy that is read, completed, and signed by the defendant and made a part of the record, and an on-the-record oral examination. ***Id***.

Moreover, "[a] criminal defendant has the right to effective counsel during a plea process as well as during a trial." ***Commonwealth v. Hickman***, 799 A.2d 136, 141 (Pa. Super. 2002). "Where the defendant enters his plea on the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." ***Id.*** (internal quotations and citations omitted). Thus, "[a] defendant is permitted to withdraw his guilty plea under the PCRA if ineffective assistance of counsel caused the defendant to enter an involuntary plea of guilty." ***Commonwealth v. Kersteter***, 877 A.2d 466, 468 (Pa. Super. 2005).

In finding that counsel's advice in the present case was reasonable and competent, the PCRA court stated:

> Appellant also alleges that counsel improperly induced his guilty plea "through Threats and Coercion," ... [and] counsel rendered "deficient performance, in erroneously threatening Petitione[r] then Defendant that 'it is guaranteed you will lose and guaranteed you will receive a life sentence.'" It must be remembered that Appellant was initially charged with first-degree murder and aggravated assault, among other charges. In exchange for Appellant's plea of guilty to the third-degree murder and conspiracy counts, the remaining charges were dismissed on motion of the District Attorney. Counsel's urging that Appellant accept such a bargain clearly did not lack a reasonable basis designed to effectuate Appellant's interest.
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> In ***Commonwealth v. Higgins***, 424 A.2d 1222 (Pa. 1980), an appellant charged with first-degree murder entered a guilty plea in which the degree of murder was reduced from first degree to third degree. The appellant challenged his conviction, arguing that counsel improperly advised him to accept the plea agreement because evidence existed to support a defense of insanity. 424 A.2d 1226. The court held that although such evidence "unquestionably" existed, the absence of criminal responsibility under the proposed defense was not certain as a matter of law. ***Id.*** "More importantly, there was evidence which, if believed, would have sustained a verdict of murder in the first degree." ***Id.*** at 1227. Under these circumstances, the court refused to find that counsel lacked a reasonable basis for recommending the plea agreement. ***Id.***
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> Here, as in ***Higgins***, the absence of Appellant's criminal responsibility is not established by the record; to the contrary, there is ample evidence which, if believed, would have the potential to sustain convictions for the more serious crimes with which Appellant was initially charged. As in ***Higgins***, Appellant now claims that his plea was improperly recommended by counsel. However, under the circumstances in the instant case, this recommendation cannot be said to lack a reasonable basis. In exchange for Appellant's guilty plea to third-degree murder and conspiracy, the charges of first-degree murder and aggravated assault were dismissed. Instead of facing a sentence of life imprisonment, Appellant was sentenced to 20-40 years

> followed by special probation. The law presumes that counsel was effective, and it is the petitioner's burden to prove otherwise. 42 Pa.C.S. § 9543(a)(2)(ii); ***Commonwealth v. Loner***, 836 A.2d 125 (Pa. Super. 2003). We concluded that this burden could not be met under the facts alleged. Rather, in light of the evidence available to the Commonwealth in its prosecution of Appellant, these allegations, if true, demonstrate that counsel reasonably weighed the available evidence, correctly advised Appellant of the potential penalty for the charges, and concluded that a trial was likely to result in a conviction and life sentence. [The PCRA court] therefore concluded that these allegations, if proven true, would not demonstrate prejudice to Appellant.

PCRA Court Opinion, 8/3/2012 at 5-6 (citations to record omitted).

Review of the certified record, including the notes of testimony of the plea hearing, and sentencing, corroborates the findings and conclusions rendered by the PCRA court. The notes of testimony relating to the entry of Appellant's guilty plea reflect that the trial court made all of the appropriate inquiries pursuant to Pa.R.Crim.P. 590. Throughout the oral colloquy, Appellant affirmed his knowledge and understanding of the charges against him, the factual basis thereof, his right to a jury trial, the presumption of innocence, and the possible sentence. Additionally, at the plea hearing, Appellant indicated that he had not been threatened or otherwise coerced when entering his plea. He further indicated that the entry of his plea was voluntary and of his own choice. It is well settled that "[d]efendants are bound by the statements they make while under oath and in open court, even if they later contend they lied and the lies were elicited by their own counsel." ***Commonwealth v. Polland***, 832 A.2d 517, 523 (Pa. Super. 2003). Thus, Appellant cannot now recant his representations made under

oath to the court. In examining the totality of the circumstances surrounding the plea and the advice given by counsel, we find no factual basis to support Appellant's claim that his guilty plea was involuntarily made. Accordingly, his claim that counsel was ineffective in obtaining Appellant's guilty plea by way of coercion and threat fails.

To the extent Appellant contends that the PCRA court abused its discretion in failing to conduct an evidentiary hearing on the allegations of coercion and threats by Attorney Welsh, we find Appellant, under the circumstances, was not entitled to such a hearing. "[U]nder Pa.R.Crim.P. 909(B), appellant is not automatically entitled to an evidentiary hearing on his PCRA petition." ***Commonwealth v. Thomas***, 44 A.3d 12, 22 (Pa. 2012). Where, as here, "there are no genuine issues concerning any material fact" a PCRA court need not conduct an evidentiary hearing before dismissal of the petition. ***Laszczynski***, 715 A.2d at 1188.

In his next three issues Appellant asserts trial court error which culminated from a hearing held July 28, 2008 on Appellant's Motion for Appointed Counsel. Because the three claims are intertwined, we will address them together. Essentially, Appellant alleges that the court not only erred in refusing to appoint new counsel to represent him during trial but also erred by not appointing separate counsel to represent him at the hearing on his pre-trial motion requesting new court appointed counsel. Appellant contends that the court's refusal violated his constitutional rights

to the effective assistance of counsel guaranteed by Article I, Section 9 of the Constitution of this Commonwealth, and the Sixth Amendment to the United States Constitution. Additionally, Appellant alleges that the trial court "pitted" counsel against Appellant at the hearing, which further exacerbated the relationship between Appellant and counsel. Appellant's Brief at 17. We find Appellant's claims unavailing.

Appellant has waived all claims of procedural deficiencies and all non-jurisdictional defects and defenses by tendering his guilty plea. ***See Commonwealth v. Jones***, 929 A.2d 205, 212 (Pa. 2007) ("A plea of guilty constitutes a waiver of all non-jurisdictional defects and defenses;" "When a defendant pleads guilty, he waives the right to challenge anything but the legality of his sentence and the validity of his plea"). As the PCRA court noted, during the oral guilty plea colloquy Appellant responded that he understood that by pleading guilty he was surrendering any right to contest the judge's decision in his pretrial motion. PCRA Court Opinion, 8/3/2012 at 7-8. Appellant further executed a written statement accompanying his guilty plea in which he further indicated that he understood that he was waiving his pre-trial rights. ***Id.*** at 8; Statement Accompanying Defendant's Request to Enter a Guilty Plea, 8/8/2008. Accordingly, Appellant has waived the right to challenge this pre-trial ruling.

Nonetheless, even if we addressed the claim, Appellant would not be entitled to any relief. Our Supreme Court has explained a defendant's right to counsel in criminal prosecutions, as follows:

> The Sixth Amendment to the United States Constitution provides that in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his or her defense. Similarly, Article I, Section 9 of the Constitution of this Commonwealth affords to a person accused of a criminal offense the right to counsel. However, the constitutional right to counsel of one's own choice is not absolute. Rather, the right of an accused individual to choose his or her own counsel, as well as a lawyer's right to choose his or her clients, must be weighed against and may be reasonably restricted by the state's interest in the swift and efficient administration of criminal justice. Thus, while defendants are entitled to choose their own counsel, they should not be permitted to unreasonably clog the machinery of justice or hamper and delay the state's efforts to effectively administer justice.

***Commonwealth v. Lucarelli***, 971 A.2d 1173, 1178 (Pa. 2009) (citations omitted). "An indigent is entitled to free counsel but not free counsel of his own choice." ***Commonwealth v. Smith***, 391 A.2d 1009, 1012 n. 3 (Pa. 1978). At the hearing on his motion, Appellant had the opportunity to address the court and explain his dissatisfaction with counsel's strategies in his case. After hearing from both counsel and Appellant, the court determined that there was no evidence presented that would cause it to reach the conclusion that counsel was not qualified to defend the case and that compromise could not be reached between Appellant and counsel as to the defense of the case. Thus, based on the testimony at the hearing we do not find that the trial court abused its discretion in refusing Appellant's

request for a change of counsel. Moreover, as to Appellant's allegation that he should have been appointed separate counsel to represent him at the hearing on his motion for change of counsel, we agree with the PCRA court that: "If a criminal defendant were entitled to court-appointed counsel at every hearing held for the purpose of determining whether or not he was entitled to court-appointed counsel, our courts would be perpetually locked in an infinite loop. We submit that this contention is unsupported by the law of our Commonwealth and is, indeed, absurd." PCRA Court Opinion, 8/3/2012 at 8.

Appellant's remaining four issues deal with claims of ineffectiveness of direct appeal counsel and PCRA counsel for failing to discover, address, and/or develop the claims previously discussed. Because we have determined that Appellant's underlying claims lack merit, the PCRA court did not abuse its discretion in rejecting Appellant's layered claims of ineffectiveness of counsel based upon those assertions. ***Commonwealth v. Paddy***, 15 A.3d 431, 443 (Pa. 2011).

Moreover, we note that Appellant had further waived any claims as to PCRA counsel's ineffectiveness by failing to address such claims in his response to the PCRA court's Pa.R.Crim.P. 907 Notice of Intent to Dismiss. ***See Commonwealth v. Pitts***, 881 A.2d 875, 880 n. 4 (Pa. 2009) (providing that claims of ineffectiveness of PCRA counsel must be raised in response to Pa.R.Crim.P. 907 notice, when court issues such notice, or

claims will be waived on appeal). The PCRA court issued its Rule 907 notice to Appellant on November 4, 2011. Appellant filed a response on November 10, 2011, which did not include any claims of PCRA counsel ineffectiveness, but merely indicated he would be filing an appeal. Accordingly, we find that the PCRA court properly dismissed Appellant's petition, and as such, we affirm.

Order affirmed.